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HYPOTHETICAL EMERGENCY SCENARIO: Release of an Unknown Substance on a Train

9:05 a.m.: Amtrak train departs Washington, D.C.

4:25 p.m.: A female passenger, preparing to depart at Rt. 128, Boston, gets up from her seat on the third car of the train. As she does she steps on a small green vial, breaking the vial. Some passengers notice an immediate strange odor in the car.

4:30: Passengers in the car alert the train crew of the incident as the train arrives at Rt. 128. At this time approximately 50 passengers are in the affected car. Train personnel investigate other possible causes of the odor (such as a backed up chemical toilet). When they are directed to the source on the floor, they cover it with newspaper and begin directing passengers to other cars. Some passengers do not smell the odor and are resistant to moving. The passengers have now spilled into the 2 adjacent cars. About 5 passengers from the car disembark, including the woman who stepped on the vial.

4:35: The train crew reports the incident of an unknown chemical release to Amtrak at South Station via radio.

4:40: Some passengers are complaining of feeling nauseated when the train stops at Back Bay. About 5 passengers from the affected car disembark at Back Bay.

4:45: Amtrak reports the incident to the Boston Police and Fire Dept.

4:48: The train arrives at South Station. Passengers and crew complain of feeling nauseated. Two passengers pass out and one passenger vomits. Some people are starting to panic as they prepare to disembark. The Boston Police arrive at the South Station train landing area just at the passengers are about to disembark.

4:50: The police call the Boston Public Health Commission and request that a health officer come to the scene. The Health Commission in turn notifies the state Department of Public Health (DPH).

5:00: Two local health officers (agents of the Boston Public Health Commission) and a DPH doctor (an agent of the Commissioner) arrive at the scene.

Questions

What is the authority of the train crew?

- Can they force people to move out of the affected car?
- Can they prevent people from getting off the train?

What is the authority of the police at South Station?

- Can they prevent people from leaving the scene?
- Can they detain people long enough to get contact information?
- Should they call the health authorities?

What is the authority of these health authorities?

- Can they evacuate the area?
- Can they detain or isolate exposed people?
- Can they order exposed people to go to a hospital?
- Can they order people to be decontaminated? (Fire Dept. has a portable decontamination unit)
- Can they seize and destroy contaminated property?

ANALYSIS OF HYPOTHETICAL EMERGENCY SCENARIO

I. AUTHORITY OF THE TRAIN CREW

A. Can the train crew force people to move out of the affected car?

Yes. As agents of the owner of the train property, the crew has authority over the use of the property and can and should take action to ensure the safety of the passengers.

B. Can they prevent people from getting off the train?

No. These facts do not justify restraining people's liberty of movement.

II. AUTHORITY OF THE POLICE AT SOUTH STATION

A. What is the authority of the police?

Can they prevent people from leaving the scene?

Can they detain people long enough to get contact information?

A large body of federal and state case law distinguishes between police officers performing their **law enforcement** and their **community caretaking** functions. While the 4th Amendment prohibits certain police practices when they are acting pursuant to their law enforcement function, courts have concluded that the Constitution does not require the police to sit idly by if immediate action is needed to prevent serious harm to people or property. Under the **community caretaking** doctrine, police officers have broad authority to take immediate action to render aid, assess and respond to situations that may pose a threat to life or property, and otherwise protect the public health and safety from harm.

Cases discussing the community caretaking function include *Cady v. Dombrowski*, 413 US 433 (1973); *South Dakota v. Opperman*, 428 US 364 (1976); *Commonwealth v. Murdough*, 428 Mass. 760 (1999); *Commonwealth v. McDevitt*, 57 Mass. App. Ct. 733 (2003); *Commonwealth v. Lubiejewski*, 49 Mass. App. Ct. 212, 216-217 (2000).

A case that does not explicitly mention the community caretaking function, but whose facts are consistent with it, is *Commonwealth v. Leonard*, 422 Mass. 504 (1996).

In Massachusetts, at least 2 rules apply when the police exercise their caretaking function.

- The police officer must have an objective basis to believe that a person's safety and well-being are in jeopardy. *Commonwealth v. Murdough*, 428 Mass 760; 704 N.E. 2d

1184, 1186 (1999). An officer's motive (e.g. a suspicion that the person may be engaging in criminal behavior) does **not** invalidate objectively justifiable behavior. *Id.* If the objective circumstances justify the action taken, that is enough. *Id.*, citing *Whren v. United States*, 517 U.S. 806 (1996).

- The police officer's actions must be totally divorced from the detection or investigation of crime, or acquisition of evidence. *Commonwealth v. Lubiejewski*, 49 Mass. App. Ct. 212; 729 N.E.2d 290, 292 (2000). In other words, the police officer must not be exercising his law enforcement responsibilities.

For courts to uphold police action as part of their community caretaking function, it is helpful if the police are acting pursuant to standard police procedures. *Cady v. Dombrowski*, 413 US 433 (1973); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

In addition, under the **law enforcement** authority of the police, there exists the emergency exception to the warrant requirement. This allows the police to **respond to emergency situations** in which there is not time to obtain a search warrant. As the Supreme Court recognized in *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978):

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' *Wayne v. United States*, 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.).

When the police act to enforce the law under the emergency exception to the warrant requirement, their actions must be limited to rendering emergency assistance (*Mincey v. Arizona*, 437 U.S. 385 (1978)), and they must withdraw once the emergency has abated (*Michigan v. Clifford*, 464 US 287 (1984); *Michigan v. Tyler*, 436 US 499 (1978)).

A police officer may not have the expertise to determine whether a particular substance or an ill person presents an immediate danger to others, or whether a crime may have been committed. Thus it is imperative that the police have the ability to communicate with, and receive guidance in a timely manner from, experts such as public health professionals and hazardous materials specialists. With input from an expert, a police officer at the scene of an emergency will be in a better position to determine that an emergency exists and the type of action necessary to mitigate the harm and protect the public.

In light of the community caretaking function and the emergency exception to the warrant requirement, it appears that under appropriate circumstances (which **must** include sufficient facts to support the existence of an emergency), and when reasonably necessary, a police officer dealing with a public emergency may:

- Forcibly enter private premises to locate victims and render medical treatment;
- Take appropriate action to contain and neutralize harmful agents on private property that pose an immediate and serious threat to public health or property;

- Forcibly isolate people or property who pose a serious and immediate threat to others because of their exposure to harmful agents or contagions;
- Mandate the evacuation of a building or area if necessary to protect occupants or others;
- Enforce decontamination of property if necessary to protect others from serious harm. People who require decontamination may be isolated if they pose an immediate threat to others, but should not be forcibly decontaminated without a court order.

In this scenario, the police may wish to get names and phone numbers of exposed people in case it is necessary to follow up with them later. Nothing prevents the police from asking for this information, but it is likely that a person cannot be forced to provide this information against his or her will.

Police officers at an emergency may encounter people who refuse medical treatment or refuse to comply with police orders. Guidelines for dealing with this include:

- A competent person has the right to refuse medical treatment even if the refusal is likely to result in serious harm or death. If the person is not competent to understand the situation and the consequences of refusing treatment, the police must if possible look first to the person's immediate family for consent. The police may only forcibly render aid to an incompetent person to the extent that they could forcibly administer aid to a competent person. The right to refuse medical treatment is discussed in *Shine v. Vega*, 429 Mass. 456 (1999); *In the Matter of McCauley*, 409 Mass 134 (1991); *Norwood Hospital v. Munoz*, 409 Mass 116 (1991).
- Chapter 123, Section 12 of the General Laws permits a police officer to restrain a person and remove him to a medical facility if a physician, qualified psychologist or qualified psychiatric nurse is not available and the officer reasonably believes that the failure to hospitalize the person will create a likelihood of serious harm by reason of mental illness. See *Ahern v. O'Donnell*, 109 F3d 809 (1st Cir. 1997); *McCabe v. Lifeline Ambulance*, 77 F3d 540 (1st Cir. 1996).
- Although a competent person may refuse emergency medical treatment, the police may nonetheless isolate or decontaminate him if he poses an immediate threat to others because of his exposure to a harmful agent or contagion.
 - **Note:** because the police should take no more action than is necessary to deal with the emergency, the police should isolate a person who refuses to be decontaminated and then seek a court order permitting decontamination.
- A police officer may forcibly remove a person from a premises or place if leaving him there poses an imminent and serious threat to others.

B. Should the police call the health authorities?

In any particular emergency situation, it may or may not make sense *operationally* for the health authorities to be involved. This scenario of a release of a noxious material might best be viewed as a hazardous materials incident, with the appropriate responders being state or local Hazmat personnel and public safety officials. Depending on how the incident unfolded, it might or might not be appropriate to involve the health authorities.

In this scenario, because people are getting sick, the police call the Boston Public Health Commission, which notifies the state Department of Public Health (DPH). Two Boston health officers and a DPH doctor arrive at the scene.

III. AUTHORITY OF LOCAL AND STATE HEALTH OFFICIALS

A. General authority

1. Coordinate disease authority of local boards of health and DPH

G. L. c. 111, § 6 gives DPH the power to define **diseases deemed dangerous to the public health**, and to make regulations for the control and prevention of disease. Section 7 provides that if smallpox or any other contagious or infectious disease declared by the Department to be dangerous to the public health exists or is likely to exist in any place within the Commonwealth, the Department shall make an investigation of it and of the means of preventing the spread of the disease, and shall consult with the local authorities. **In such cases, DPH has co-ordinate powers with the board of health (“BOH”) in every city and town.** The authority of the boards in these situations is found in c. 111, §§ 92 - 116. The Boston Public Health Commission is a “local board of health” within the meaning of the statutes.

Regulations at 105 CMR 300.000 (Reportable Diseases and Isolation and Quarantine Requirements) set forth the **specific diseases that the Department has declared are dangerous to the public health.**

- 105 CMR 300.100 lists diseases that are reportable to boards of health. Boards must then report these to DPH under 105 CMR 300.110.
- 105 CMR 300.150 allows the Commissioner to require temporary reporting of, to authorize surveillance of, and to establish isolation and quarantine requirements for, diseases or conditions that are **newly recognized or recently identified as a public health concern**. On March 20, 2003, the Commissioner used this authority to require immediate reporting of SARS to the Department.
- 105 CMR 300.133 requires health care providers and others (supervisors of schools, day care centers, camps, etc.) to immediately report a case or suspect case of an **unusual illness** to the BOH. If the BOH is unavailable, the person must contact DPH directly.
- 105 CMR 300.134 requires the people named above to immediately report the occurrence of any **suspected cluster or outbreak of any illness** to the BOH. If the BOH is unavailable, the person must contact DPH directly.
- 105 CMR 300.190 sets forth the authority of DPH and BOHs to conduct surveillance activities necessary for the investigation, control and prevention of diseases dangerous to the public health. These activities include but are not limited to investigation in order to determine the causes and extent of such diseases; identification of cases and contacts;

and monitoring the medical condition of individuals diagnosed with or exposed to such diseases.

In situations where a threat to public health is suspected but the specifics are unknown, such as this scenario which may involve a chemical exposure, the authority of the BOH or DPH is less clear. Arguably, the DPH or the BOH could decide that there is a reasonable possibility that a disease dangerous to the public health exists, or that a putative chemical exposure could lead to such a disease, thus triggering their authority under various statutes. In addition, if the condition appears to be reportable as an “unusual” illness or as part of an outbreak or cluster, this would bring the situation under the jurisdiction of the health authorities.

2. Board of Health authority over nuisances

Boards of health, but not DPH, have authority over **nuisances** under c. 111, §§ 122 – 131.

B. Can the health authorities evacuate the area?

1. Coordinate disease authority of BOHs and DPH

Evacuation may be ordered, with the caveat noted above that this exposure would need to be regarded as a “disease dangerous to the public health.” Under G.L. c. 111, § 104, the BOH (and selectmen) “shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety.” A letter from the DPH General Counsel to the Quincy Public Health Commissioner dated November 5, 2001 gave the opinion that the BOH could close a building due to suspected anthrax contamination, pending investigation results. Here, if the health authorities believe that the broken vial may be spreading a dangerous disease, they may evacuate the area or close a building.

2. Nuisance authority of BOH

Under c. 111, § 131, if the board finds it necessary to *enter* land, buildings or premises to investigate a nuisance or cause of sickness and entry is refused, the board must get a warrant from a court or a magistrate.

C. Can the health authorities detain or isolate exposed people?

Coordinate disease authority of BOHs and DPH

Under G.L. c. 111, § 95, if a disease dangerous to public health breaks out, the BOH must provide for the accommodation of the sick people and for the safety of the inhabitants of the town. Together with c. 111, § 104 (see above), this should allow for an immediate order to isolate a sick person if he or she poses a serious threat to public health.

In general, existing case law and statutes lend support to the notion that the health authorities can involuntarily isolate people without a prior hearing in an emergency situation. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14

Hofstra Law Review 53, 80 (1985). The case law also suggests that the authorities have an obligation to seek a court order as soon as possible in order to continue this type of isolation. *Id.*

However, in this hypothetical situation, it is not clear whether the people who were exposed to the substance have a disease, or whether they pose a threat to *others*. On the facts given above, it is unlikely that the health officials have the authority to isolate people. They must gather more information before taking coercive action.

D. Can the health authorities order exposed people to go to a hospital?

Coordinate disease authority of BOHs and DPH

Under G.L. c. 111, §§ 96 and 97, the BOH must get a warrant to remove a person infected with a disease, or a carrier of disease, from his home to a hospital. However, a person may only be removed from his or her home if he or she lives in a boarding house or hotel, or 2 or more families occupy the dwelling, or the patient cannot be properly isolated. There is no modern case law under these sections, but it may be assumed that a warrant would still be required for forced hospitalization.

In Boston, however, a new local public health regulation allows for the issuance of an isolation order. On November 5, 2003, the City of Boston Public Health Commission promulgated a “Regulation for the Isolation and Quarantine of Individuals with Infectious Disease Dangerous to the Public Health.” “Infectious disease dangerous to the public health” is defined to include all reportable diseases; any uncommon, unusual or rare diseases; and any illness believed to be part of an outbreak or cluster. The regulation allows the Executive Director of the Commission to issue an isolation order to a person when voluntary isolation is not sufficient to contain the spread of disease, and the person poses a significant threat to public health. Since such an order must be issued by the Executive Director, as a practical matter it would take at least some time for such an order to be issued. Orders are enforced by the Boston Public Health Commission and the Boston Police Department.

Again, the caveat above applies, because it is not clear that any disease is spreading at this time. The health authorities need more information.

E. Can the health authorities order decontamination of people?

Due to Constitutional limitations, especially the Fourth and Fifth Amendments as they bear on people’s right to bodily integrity, there is probably no authority to decontaminate a person without a court order if the person refuses to be decontaminated. As noted above, *if* the person poses an immediate threat to others, the BOH and DPH can isolate him or her, and then should as soon as possible seek a court order permitting decontamination.

F. Can the health authorities seize and destroy contaminated property?

1. Coordinate disease authority of BOHs and DPH

Under G.L. c. 111, § 99, a BOH may apply for a warrant to direct a sheriff or constable to secure baggage, clothing or goods that are suspected to be infected with a disease dangerous to the public health, and to impress men to secure the items and post guard over the place where they are. Under § 100, the same warrant may direct the officers to impress houses or stores for the safe keeping of the infected articles, and the BOH may move them there or otherwise detain them until they are “freed from infection.” Early case law indicates that the BOH must get a warrant to clean or destroy the articles. *Brown v. Murdock*, 140 Mass. 314 (1885).

Section 102 of chapter 111 provides that it is the BOH that determines whether the owners of the articles or the town are to pay the expenses of securing, transporting, and purifying the articles. For any article of furniture or clothing ordered destroyed by the board, the town “may” recompense the owner an amount not exceeding \$50.00.

Under G.L. c. 111, § 103, the town where the people or property are impressed (for guarding or storing items) must pay just compensation to the people “entitled thereto.” Compensation for taking or impressing property may be recovered under chapter 79 (eminent domain).

2. Board of Health authority over nuisances

Chapter 111, §§122 et seq. set forth BOH authority over “nuisances, sources of filth and causes of sickness” in the town. Under § 123, the board can order the owner or occupant of any premises to abate a nuisance within 24 hours or other reasonable time. The order is summary in nature and is not subject to judicial review before it must be carried out. *Stone v. Heath*, 179 Mass. 385, 60 N.E. 975 (1901). Nor is it necessary for the board to give notice to the defendant before it issues an order to abate. *Commonwealth v. Collins*, 257 Mass. 580, 154 N.E. 266 (1926). The order must be in writing and served as directed by § 124. Under § 125, if the owner or occupant does not comply with the order, the board may abate the nuisance itself and charge the owner for the cost of abatement.

Under c. 111, § 131 if the BOH considers it necessary to enter land or premises to destroy or remove a nuisance or cause of sickness and entry is refused, the BOH must get a warrant. The warrant allows a sheriff, constable or member or agent of the board to remove or destroy the nuisance.

Although not entirely clear, the BOH probably has authority to summarily destroy a nuisance if it poses an immediate threat to public health. However, if the board is refused entry to the property where the nuisance is, it appears that a warrant must be obtained.

G. NOTE that the authority of the police under the **community caretaking doctrine** and the **emergency exception to the warrant requirement**, discussed above, may be broader in some instances than that of the health authorities.

TEXT OF M.G.L. c. 111, §§ 6 AND 7

Section 6. The department shall have the power to define, and shall from time to time define, what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health. The department shall also have the power to define, and shall from time to time so define, what diseases shall be included within the term venereal diseases in the provisions of the laws relative to public health.

Section 7. If smallpox or any other contagious or infectious disease declared by the department to be dangerous to the public health exists or is likely to exist in any place within the commonwealth, the department shall make an investigation thereof and of the means of preventing the spread of the disease, and shall consult thereon with the local authorities. It shall have co-ordinate powers as a board of health, in every town, with the board of health thereof. It may require the officers in charge of any city or state institution, charitable institution, public or private hospital, dispensary or maternity hospital, or any board of health, or the physicians in any town to give notice of cases of any disease declared by the said department to be dangerous to the public health. Such notice shall be given in such manner as the department may deem advisable. If any such officer, board or physician refuses or neglects to give such notice, he or they shall forfeit not less than fifty nor more than two hundred dollars.